SUPREME COURT OF THE UNITED STATES.

October Term, 1896.

No. 108. 167-371

THE CITY OF NEW ORLEANS, THE BOARD OF ASSESSORS OF ORLEANS ET AL., APPELLANTS,

versus

THE CITIZENS' BANK OF LOUISIANA.

Appeal from the Circuit Court of the United States for the Eastern District of Louisiana.

PETITION AND BRIEF OF BOARD OF ASSESSORS AND TAX COLLECTORS, APPELLANTS, FOR REHEARING.

SYLLABUS.

A rehearing is asked in this case by the State officers, appellants, because it is respectfully submitted that the Honorable Court erred in basing its opinion on the maintenance of the plea

of *res adjudicata*, or the acquiescence of the State or its officers in the exemption of the Citizens' Bank, appellees, for the following reasons:

The Federal Courts are bound by the decisions of the State Supreme Courts in the construction of State Statutes, unless a federal question be involved. Eng. and Am. Encyc. of Law, Vol. 27, p. 600, and authorities cited in note 4; 142 U. S. 293; 107 U. S. 120; 125 U. S. 555; this is also the rule in cases of estoppel. Herman on Estoppel, Vol. 1, p. 684, and authorities cited in note.

No greater effect is to be given to a judgment of a State Court "than it would have in the State where it was rendered." Eng. and Am. Encyc. of Law, Vol. 21, p. 283, and authorities there cited in note.

Definition and effect of the thing adjudged. La. Civ. Code, Arts. 3556, Sec. 21; 2286.

The plea of *res adjudicata* will not be maintained under these articles in the Louisiana Courts, where previous judgments for taxes of prior years are pleaded as the thing adjudged in suits for taxes of other and different years. 49 An. 401. This rule of law applies as well to prior judgments for taxes, when they involve questions of exemption *vel non*. 41 An. 998; 46 An. 1570; City of N. O. vs. Rosenstream, Weiss & Co., Court of Appeals for Parish of Orleans.

This rule holds also in other States and has been sustained by the Supreme Court of the United States. 38 Iowa, 633, 639; 72 Tex. 554; 152 U. S. 316; 161 U. S. 174. (Affirming a decision

of the Supreme Court of Tennessee). 152 U. S. 301, 314.

" *It could never be tolerated that the State should be forever barred in its collection of taxes by an erroneous decision.* 152 U. S. 316; 161 U. S. 187, 193, 198.

152 U. S. 305, on this point turns altogether on the question of *res adjudicata* in taxes of different years, and does not differentiate the principle on account of the difference in parties in the two suits.

The doctrine in 38 Iowa, 633, is modified and qualified by a *divided* Court in 59 Iowa, 226, but the doctrine in 38 Iowa is again fully reasserted by a unanimous Court in 24 N. W. 514, and the later decision is now the law of the State of Iowa.

1 How. 134, 139; 20 Wall. 142; 101 U. S. 638; 94 U. S. 353; 34 La. An. 814; 152 U. S. 252; 144 U. S. 610; 157 U. S. 687; 94 U. S. 428, cited by your Honors in the opinion do not apply to the present case, because they were in cases other than tax suits. Insofar as they do apply, however, even remotely, they support our position, and the doctrine, laid down in 5 Wall. 592, that to constitute *res adjudicata* in the prior judgments relied on, the record must show "that the particular controversy was necessarily tried and determined," and "that the verdict could not have been rendered without deciding the particular matter," and "even where it appears from intrinsic evidence that the matter was properly within the issue controverted in the present suit, if it be not shown that the verdict and

judgment necessarily involved its consideration and determination it will not be concluded."

The issues and questions in the judgments pleaded as *res adjudicata* were only as to the constitutionality of the Bank's original exemption under the Louisiana Constitutions of 1812, 1845, 1852, 1864 and 1868. In none of them was the issue directed as to the effect of Act 47, 1874, extending the exemption, or to the effects of Act No. 97 of 1880. These questions are *res nova* based on different facts, and involving distinct and diverse questions of law from those presented and adjudged in the cases pleaded as *res adjudicata.*

This is also the rule of the civil law as shown by the French Commentators Marcadé, Explecation de Code Napoleon, Tom 5, p. 167 5me edit.; Pau 19 Mars; Devil et Car. 34, 11, 441; Laurent Droit Civil Français, Tom XX, pp. 81, 82, Sec. 64.

Of the judgments in the cases pleaded as the thing adjudged, Citizens' Bank vs. Bouny, falls into this category, and was in a case arising before the expiration of the original charter in the bank in 1884; Citizens' Bank vs. Board of Assessors, 12,429, Civil District Court falls in the same category, and besides the record is incomplete, showing no petition or answer, or any other evidence of issue joined. The Bouny judgment was pleaded in it as *res adjudicata;* City of New Orleans vs. Citizens' Bank, 3629, Division A, for taxes of 1880, falls also in the same category, besides the State or its officers were not parties to the suit. The judgment is

therefore an absolute nullity so far as they are concerned, 41 An. 998; Citizens' Bank vs. Cavanac, falls also in the same category as the Bouny case, and besides there was no judgment at all rendered. Citizens' Bank vs. Board of Assessors, 20,541; Civil District Court, Division A, shows no appearance by, or default against the State officers, it is therefore an absolute nullity; Citizens' Bank vs. Board of Assessors, 16,141, Division D, Civil District Court, for taxes of 1886, exonerates the shareholders from paying the tax on shares held by them, the judgment is a nullity insofar as this part of the decision is concerned, as the shareholders were not parties to the suit, and the bank is without right to stand in judgment for them, this your Honors decide. It was *coram non judice.* 41 Ill. 45; Herman on Estoppel, Vol. 1, page 551. Section 458. As to the question of the bank's obligation to pay the tax assessed on the shareholders, that could only arise when the effort was made to collect the tax from the bank. That question has never been litigated, except in the present suit, since the expiration of the bank's original charter. None of these judgments are therefore *res adjudicata.*

In so far as the question of the exemption of the capital stock is concerned in those cases, *as in the present case*, it is a *moot* question, such as the Courts can not and will not decide. There has not been any taxation on capital stocks of banks in Louisiana since 1877. Such taxation is positively prohibited by Sec. 1, par. 6, Act No. 8 of 1878; Sec. 48 of Act No. 77 of 1880;

Sec. 28, Act 96 of 1882; Sec. 28 of Act 98 of 1886; Sec. 27 of Act No. 85 of 1888; is now in force. No attempt has been made since 1877 to tax capital stock of banks, and the tax rolls of record in this cause show that no such attempt is being made here. It is therefore a *moot question* or feigned and fictitious issue which this Honorable Court can not and will not pass upon. 18 Wall. 134.

48 A. 35 can not have any bearing on the present cause because the S. C. of La. purposely and pointedly refused to pass upon the issues raised in the present cause, and they were not necessarily involved in the case. Any reference to them in that case would have been an *obiter dictum.*

The argument in the opinion of your Honors that the State and its officers have acquiesced in the continued exemption of the bank, by the failure to assess it for taxes during certain years is inconclusive, and can not and should not prevail. No laches, negligence, silence, inaction, carelessness or collusion of the officers of the sovereign, in the non-collection its fisc can prejudice the rights or claims of the government on its subjects. Broom's Legal Maxims, 8th edit., p. 65; Bacon's Abridgm., 8 Vol. (Bouvier's Am. edit.) 95; 12 Wheat. 505; 3 Mason 446; 1 Peters 325; 1 Mass. T. R. 347; Eng. and Am. Encyc. of Law, Vol. 1, p. 562, and authorities cited in note 2; Meacham on Public Officers 308; 9 Wheat. 720. La. Cons. 1879, Art. 57, prohibits the General Assembly, even, from relinquishing any claims of the State.

"A general rule was laid down in this case to which this Court has steadily adhered, that the taxing power of the State should never be presumed to be relinquished, unless the intention to do so is declared in clear and unambiguous terms. This case was reaffirmed in the Delaware Railroad Tax, 18 Wallace 206." 152 U. S. 305; 10 How. 376; again in regard to tax exemptions "Nothing can be taken against the State by inference."

To the Honorable the Chief Justice and Associate Justices of the Supreme Court of the United States:

This, the petition of rehearing of the Board of Assessors for the Parish of Orleans, and the State Tax Collectors of the parishes, of the State of Louisiana, appellants herein, respectfully represents that by the judgment rendered herein by this Honorable Court on May 24th, 1897, not yet become final, Appellants as the representatives of the State of Louisiana in their various capacities will be greatly injured if said judgment is allowed to stand and become final and executory; that said judgment and the decree and orders thereunder are, with due respect and deference to this Honorable Court, contrary to the law and the evidence, and should be reconsidered, reviewed and set aside after a rehearing granted and the case reargued. Wherefore, appellants and petitioners pray that said rehearing may be granted for the following reasons and on the grounds hereinafter set forth:

We respectfully submit that it is unnecessary for us to reargue the propositions so fully discussed in our former briefs, that is, 1st, that the General Assembly of the State of Louisiana, session of 1874, did not and could not, legally and constitutionally

extend the exemption of the bank beyond the year 1884, for the reason that under Article 118 of the Louisiana State Constitution of 1868, then in force in 1874, no such exemption was allowed or permitted.

2d. That, even if this were not so, the bank itself renounced its exemption privileges in 1880, by applying for and receiving from the General Assembly of Louisiana in that year, special privileges by a special legislative act of relief, which it could not have obtained, had it not renounced its prior exemption, as required by Articles 234, 203, 205, 207 and 237 of the Constitution of 1879. Having renounced and abandoned its exemption, it was thereby deprived of it, even if it should be held that the Act of 1874 was valid and constitutional, in prolonging, extending and continuing the exemption. Even if the contention of the appellees be correct, that the charter was a contractual obligation between the State and the bank, in which the State was a party or partner in interest, the renunciation by the bank for the consideration of the special privileges granted by the Act of 1880, terminated the exemption. For if A and B enter into a contract, and A agrees to allow B certain additional privileges or rights not contained in the original contract, on condition of B's renouncing certain

of his rights and privileges, under the original contract, B cannot afterwards insist on the rights and privileges which he has abandoned and renounced, in consideration of the special rights and privileges granted to him by the new agreement, modifying the old contract. So, even, granting for the sake of argument, that the constitutional extension of the bank's exemption by Act 47 of 1874, as contended for by our opponents, the bank abandoned the extension of the exemption by renouncing and abandoning it in 1880. These propositions were so fully discussed both in our former briefs, and in the oral argument, that we consider it unnecessary to here reiterate the reasoning or to again cite the authorities thereon. Moreover we are the more strongly impelled to this omission, by the fact that while the majority of this Honorable Court in its opinion does not especially admit the force of these propositions, it seems inclined thereto, and bases the judgment and decree entirely on the plea of

RES ADJUDICATA.

The majority of this Honorable Court, says, in its opinion (p. 9). "Passing the consideration of the question of the correctness of the decisions of the Courts of Louisiana, and the influence which they should have upon this Court in interpreting a purely Louisiana contract, the question arises, are

not the judgments rendered between the bank, the Board of Assessors, the City of New Orleans and the State taxing officers, absolutely conclusive under the principle of the thing adjudged of the issue here presented? Of course, if the judgments are the thing adjudged, and conclusively determine as between the parties that the exemption of the bank under its charter exists, to the extent determined by the judgments, the duty in that regard of discussing the charter itself will be eliminated, since the effect of the thing adjudged will be to settle that question.

In considering this question, we at once eliminate all the judgments rendered prior to the period where the amended charter took effect, and therefore confine our examination to the two judgments rendered by the Civil District Court, the one as to the taxes of 1886, and the other as to those of 1887. The reasons relied on to establish that these judgments do not constitute the thing adjudged are embodied in those propositions."

The opinion then discusses the three propositions: 1st. That the judgments rendered in those cases were against officers different from those now in Court. 2d. That the questions presented and decided on those cases were not identically the same as those presented in the case at bar; and 3d,

that the judgment pleaded as *res adjudicata* were in suits for taxes, for years different from those in the present suit; and therefore that the judgments in the prior cases could not be pleaded as *res adjudicata*. The opinion negatives these three propositions.

On p. 14 (op.), your Honors say: "It results from the foregoing that the two judgments rendered after the expiration of the original charter necessarily adjudged the claim of facts and conditions as those here presented, and they therefore are conclusive."

Eliminating for the purposes of this argument at this time, any decision as to the two first propositions mentioned above, we submit, with all due deference, that your Honors erred in rejecting our third proposition, and propose to show that the plea of *res adjudicata* should not be maintained in the present cause, and that the authorities cited by your Honors do not apply to the present cause.

We have heretofore submitted no authorities to show how the Courts of Louisiana have interpreted the plea of *res adjudicata* as applicable to tax cases such as the present. To supply this deficiency and omission, we now ask your Honors attention to the following: We take it that your Honors will follow in this case the rules of interpretation on this subject, laid down by the Courts of Louisiana.

We cite the following as establishing the rule of practice of the Federal Courts in that regard:

"If there is in any State a settled rule of construction of a statute, and if that construction was announced before the rights which are the subjects of the controversy in the United States Courts attached, the United States Courts will be bound by the adjudicated rule of the State Courts, even though they have to overrule their own former decisions." Eng. and Am. Ency. of Law, Vol. 27, p. 600, and authorities cited in Note 4, including late cases. 142 U. S. 293; 107 U. S. 120; 125 U. S. 555.

In addition to that principle of practice, we invoke also the following, as applicable to the judgments pleaded as *res adjudicata* in this cause:

"And in cases depending on the laws of a particular State, the Supreme Court of the United States adopt the construction of those laws, which have been given by the Courts of that State, whatever may be the opinion of the Court as to their original soundness, and though, independently of such decision, it would have decided differently." Herman on Estoppel, Vol. 1, p. 684, and a multitude of U. S. authorities cited in note.

"No greater effect is to be given to it (the judgment), than it would have in the State where it was rendered." Eng. and Am. Ency. of Law, Vol. 21, p. 283, and authorities in note.

We therefore confidently presume that if we show that the Courts of Louisiana have decided that the plea of *res adjudicata* will not apply, where the decision offered was for a tax of a different year than that sued on, your Honors will follow that interpretation of the Civil Code of Louisiana, that Code being only a statute of the State. Art. 3556, Sec. 31, of that instrument, reads:

"Thing adjudged is said of that which has been decided by a final judgment, from which there can be no appeal, either because the appeal did not lie, or because the time fixed by law for appealing is elapsed, or because it has been confirmed on appeal."

Article 2286, reads: "The authority of the thing adjudged takes place only with respect to what was the object of the judgment. The thing demanded must be the same; the demand must be founded on the same cause of action; the demand must be between the same parties, and formed by them against each other in the same quality."

The Supreme Court of Louisiana has frequently interpreted these articles in tax matters.

In Carré vs. City, 41 An. 998, the plaintiff claimed that certain property was exempt from taxation for the year 1882, and plead as *res adjudicata* that in precisely similar cases between the parties, that is Nos. 10,911 and 11,772, the Civil District

Court had decided that the property was exempt, and that those judgments were not appealed from, and were final.

The Supreme Court of Louisiana said (on p. 998), that in one of those cases the City was not a party, and therefore not bound by it, and further said: "If the judgment declared the property exempt from the taxes for those years, it did not go to the extent of including those for 1882, and does not constitute any more than the first *res judicata*." It will be observed that this case, like the one at bar, was one of exemption *vel non*.

In Mathes vs. Board of Assessors, 46 An. 1570, the plaintiff brought suit to cancel an assessment made on certain property for the year 1893, which he claimed to be not liable to assessment and taxation, and to be exempt. Plaintiff pleaded *res adjudicata*, based on two judgments, in cases between the same parties on the same issue, which were rendered in the Civil District Court, one on March 14th, 1884, and the other in 1885, neither of which were appealed from, and both of which decided the property to be exempt. He claimed "that the judgments of the Civil District Court settled the question once for all, and is now *res adjudicata*."

The Court said: "We think the plea of *res judicata* based on the judgments of the Civil District

Court, holding the land not subject to taxation cannot prevail."

In a recent case in the Supreme Court of Louisiana, Southern Insurance Company vs. Board of Assessors (49 An. 401), the plaintiffs brought suit to reduce an assessment as excessive, and claimed "that precisely the same issue as presented here, has been adjudicated in favor of petitioner and against the present defendants in the suits brought by petitioner against said defendants, viz: Suit No. 32,994, Civil District Court, and No. 44,087, Civil District Court, and petitioner pleads each of said suits as *res judicata*." The suit was in regard to the assessment for the year 1895. The suit No. 32,994 pleaded as *res judicata* was on the assessment for the year 1891, and the judgment was signed December 24th, 1891, and was unappealed from. That of 44,087, similarly pleaded, involved the assessment for the year 1894. The Supreme Court overruled the plea of *res adjudicata*, saying: "Counsel urges the exception of *res judicata* pleaded below, based upon the judgments in their favor in the suits Nos. 32,994 and 44,087 of the Civil District Court. They say that precisely the same issue was presented in those cases as is presented here, and that it was raised and decided between the same parties. The suits involved the as-

sessmcnts of 1891 and 1894. The judgments referred to not having been appealed from, fixed the rights of the parties as involved in that particular litigation. Their effect extended no further. It is to be noted that in all these cases the conditions, parties and circumstances were the same as the cases pleaded as *res adjudicata*. Of that there was no question.

In a recent case, decided by the State Court of Appeals for Orleans (a Court of final resort, whose jurisdiction, however, is limited), that Court said in a license case, City of New Orleans vs. Rosenstream, Weiss & Co., where the plea of *res adjudicata* was urged, in a case of a license tax for a prior year, in which the defendants were declared to be exempt, the Court said "on claims for licenses of different years the thing demanded and the cause of action may be similar, but they are not the same," and overruled the plea.

Nor is the principle confined to Louisiana. In 38 Iowa, 633, 639 (City of Davenport vs. C. R. I. & P. R. Co.), a case in which the plea of *res adjudicata* was interposed in a suit concerning taxes for 1867, 1868, 1869, 1870 and 1871, because of a former final judgment in the matter of taxes for the years 1863, 1864 and 1865 had decided the railroad to be exempt, the Court said, overruling the

plea: "The demurrer raises the question whether that judgment works an estoppel of the plaintiff to collect the taxes sued for in this action. We are of the opinion that it does not. While this action may be conceded to be between parties and privies to the former decree, yet we think it is clear that the subject matter of the two actions are not the same. The taxes enjoined in the former suit were those for 1863, 1864 and 1865. This action is to recover for subsequent taxes. Each year's taxes constitute a distinct and separate cause of action, and determination of the matters involved in the injunction suit, reached no further than the taxes of the years then in question. The cases are unlike those where two causes of action (as two promissory notes), forming the subject matter of successive actions between the same parties, *both growing out of the same transaction*, in which a defense set up in the first suit and held good, will conclude the parties in the second. So a judgment of a competent Court upon the validity of coupons, attached to a bond, is conclusive in another action, between the same parties upon other coupons attached to the same bond. Bochard vs. Diaz, 3 Denio 238; Whittaker vs. Johnson County, 12 Iowa, 595. But the taxes of separate years do not, in any just sense, grow out of the same transaction. They are like

distinct claims on two different promissory notes made upon two distinct and separate, though similar transactions, between the same parties. A judgment on one of such notes, it is quite clear, would not be of any force as an estoppel in an action on the other note between the same parties." Some thirteen cases are cited by the Court in support of their decision on this point. This decision was subsequently maintained in 68 Iowa, 692. Similar doctrine was maintained in 72 Tex. 554. In 152 U. S. 316, the U. S. Supreme Court quoted, with approval, from the decision on this point in 38 Iowa, 633, and added: "*It could never be tolerated that the State should be forever barred in its collection of taxes by an erroneous decision.*" (The italics are our own).

Among the authorities cited as suppporting this decision, and which bear on the point at issue here, are 146 U. S. 302.

In 161 U. S. 174, a part of the syllabus reads: "The ruling of the highest Court of a State, in a suit to recover taxes alleged to be due, concerning the effect to be given to a former judgment of the same Court as to the liabilities of the same parties to pay similar taxes previously assessed, is not subject to the review of this Court." In that case the State of Tennessee filed a bill to recover "taxes

alleged to be due from the corporation, plaintiff in error, or its stockholders, to the City of Memphis, for the years 1888 to 1891, inclusive." "By its answer the defendant company claimed immunity from taxation both for itself and its shareholders, and also set up a plea of *res judicata*," etc. The prior final judgment pleaded was for the taxes of the year 1873. The Supreme Court of Tennessee decided that the judgment was not an estoppel as *res adjudicata*. Your Honors said (p. 184): "We think the decision of the Supreme Court as to the weight to be given, the judgment is not reviewable by us because it is not a Federal question." And again, on p. 185: "If the State Court erroneously decides a question of law regarding the weight to be given one of its own judgments in its own Courts and among one of its own citizens, that error is not subject to review by this Court, because it constitutes no Federal question." Again, on p. 186, citing 152 U. S. 301, 314, yours Honors said: "It is said that a suit for taxes for one year is not a bar to a suit for taxes for another year; that it is not the same transaction, and the judgment in a prior action can never operate as an estoppel other than as to those matters which were in issue and controverted, and upon the determination of which a finding or verdict was rendered. It is not necessary

in this case to determine whether there was any one particular fact in issue and litigated in the first case, and which would be closed from further controversy, and which, as thus decided, would preclude a recovery in this case. We hold that the question in any event, as presented in this case, was not a Federal one." See also on same subject 161 U. S. 187, 193 and 198, and on non-identity of cause of action, and variations of conditions and circumstances already alluded to and argued in our original brief.

The principle enunciated by your Honors in 152 U. S. 315, which we have put in italics above, is emphasized by the claim in this case that two judgments rendered by an inferior tribunal in suits brought against a subordinate revenue officer, defended by his private counsel, not brought to the attention of any State authority, either the Auditor or Attorney General is pleaded as a perpetual bar to all further claim for taxes on part of the State. The tax collector only had control of the roll for the current year, the taxes for which were enjoined; he had no interest beyond his commissions on the amount of the year's taxes; his attorneys were not interested beyond the temporary relation existing between them. The record shows that only a perfunctory defense was made, no interest was mani-

fested, no real effort to defeat the exemption claimed, or present the question to the Court. Surely the State's interest in a great question, involving its sovereignty and support, cannot be thus forever sacrificed.

In your Honors' opinion on p. 17, the Court attempts to differentiate 152 U. S. 305 from the case at bar, saying: "In the Keokuk case the Court held that the controversy which it decided was not between the same parties, as was the controversy in the case wherein the judgment was rendered which was relied upon as *res adjudicata*. The two judgments not being between the same parties or their privies it would have been *res judicata*."

A close reading of that case shows that there were three points presented. 1st. "Whether the defendant, the Keokuk & Western Railroad Company, was entitled to the exemption of its property from taxation contained in the original charter to the Alexander and Bloomfield Railroad Company, of which road it is the successor in interest."

On this point alone the Court decided that there was not such a privity existing between the first and second companies, as to continue the exemption in favor of the second and succeeding railroad. The second point was as to whether a prior judgment in

the case of Missouri vs. Missouri, Iowa and Nebraska R. R. Co., in a tax suit for a different year against the Alexandria and Bloomfield R. R. *was res adjudicata* in favor of the Keokuk and Western, in a suit against the latter for taxes of a different year.

The Court decided broadly (p. 314, bottom), "a suit for taxes for one year is no bar to a suit for taxes for another year. The two suits are for distinct and separate causes of action." On this second point they base their decision on this simple proposition. They do not base it on any want of privity between the first and second railroads, nor on the fact that the two corporations were separate, distinct and different parties. The reading of the decision makes it perfectly plain, that the ground of it is that a judgment on a tax case for one year is not *res adjudicata* in suit for taxes in another and different year. Having thus decided on these grounds, the Court adds in (3). "In addition to the fact above stated that a suit for taxes for one year is not an estoppel to a suit for taxes for a different year, there is the same absence of that privity of estate so indispensable to an effective estoppel, which we hold to be fatal in respect to the judgment in the State Court. This third point concerned however another distinct and different judgment pleaded also as *res adjudicata*, Secor vs.

Missouri, Iowa and Nebraska Co., and the county Court and the collectors of revenue.

This is plain from the epigrammatic, and decisive expression on p. 316. "IT COULD NEVER BE TOLERATED THAT THE STATE SHOULD BE FOREVER BARRED IN ITS COLLECTION OF TAXES BY AN ERRONEOUS DECISION." The capitals are our own.

Your Honors also say (on p. 17, op.), alluding to Davenport vs. Chicago Rock Island, etc,, Railway, 38 Iowa, 633. "But that case stands alone and the language therein used has been since, if not repudiated, at least qualified by the Supreme Court of Iowa to the extent necessary to bring that case in harmony with the true and universal doctrine so often laid down by this Court," and your Honors then quote from Goodnow vs. Litchfield, 59 Ia. 226.

The latter decision was by a divided Court, two Justices dissenting in February, 1882. In a still later decision of the same Court, Tubessing vs. City of Burlington, in 24 N. W. 514 (Sept. 1885), a unanimous decision reaffirmed, 38 Iowa, 633, 639, saying:

"In City of Davenport vs. Chicago R. I. and P. R. Co., 38 Iowa, 640, the Court said: 'The taxes of separate years do not in any just sense grow out of the same transaction.' In our opinion, then the

claim based upon the adjudication cannot be sustained."

An application for rehearing was denied April 23d, 1886, 28 N. W. 19. It would thus seem that the Iowa Supreme Court has adhered to the doctrine in 38 Iowa, except in the case of the divided Court in 59 Iowa, and that the doctrine of the Davenport case is the present law of Iowa.

We have carefully reviewed, studied and digested the authorities cited by yours Honors (p. 15, et seq., Op.), and with all due deference, we submit, that in our opinion none of the cases cited apply in principle to the case at bar, that is one for taxes for a year, or years, different from those in the case or cases pleaded. In Bank vs. Beverly (1 How. 134, 139), the question presented was (p. 148), as to whether *facts* decided upon in the present case could be controverted in a subsequent suit. The Court said: "So far as the evidence and facts of that case were considered and adjudicated, the decree of this Court is final and conclusive; the parties and subjects of controversy between them were the same as are now before us; negligence and misapplication of assets were charged on the executors, the existence of debts to them or the banks was denied by the complainants, and now defendants, and both facts adjudged and decided

adversely to them; and the auditor's report was confirmed, whereby every fact it contained became established and binding on the parties in any future controversy, as to any matter thus adjudicated. In Hopkins vs. Lee, this Court state the settled law of all Courts to be, that as a general rule, a fact which has been directly tried and decided by a Court of competent jurisdiction, cannot be contested again between the same parties, in the same or any other Court." It thus appears that the Court went no further than to hold that *facts* established in the prior suit between the same parties could not be controverted in a subsequent suit. In 20 Wall. 142, (Tioga R. R. vs. Blossburg and Borning R. R.), there was an attempt made to show that "on the contract now in question, the matter of the difference for which the present suit is brought was not a question decided.

"But we have looked at the record and proceedings therein, which were in evidence in this case, and are satisfied that it was decided.

"The report of the case in 1st Keyes, 486, shows it was the only question before the Court of Appeals, to which Court the case was carried. This point then is *res adjudicata* between the parties. It cannot be litigated again on the same contract." Thus the identity of the issues in the two cases was

apparent. 101 U. S. 638, was a suit for a second installment on a contract, the validity of which had been maintained in a prior suit on the first installment; the Court held the plea of *res adjudicata* to be good. This case does not apply here for the reasons given in 38 Iowa, 633, 639, 152 U. S. 315, and the other authorities hereinbefore cited by us, which widely differentiate the case in 101 U. S. from tax cases. 94 U. S. 353, only enunciates the same principle. So far as 34 La. An. 814 is concerned, we have already shown that the principle therein laid down is not only not applicable to tax cases, but the Supreme Court of Louisiana has especially and pointedly so declared in 41 An. 998; 46 An. 1570; 49 An. 401; and the Court of Appeals in the City of New Orleans vs. Rosenstream, Weiss & Co. have similarly decided, and 41 An. 998 and 46 An. 1570 *were cases of exemption, in which the property had been previously decided to be exempt*, and yet the Court decided that these prior cases could not be pleaded as *res adjudicata*.

We think, therefore, that we have conclusively shown that the plea of *res adjudicata* should not *be maintained* in suits for taxes for different years, even if the issues were identical in the suits pleaded *with those in the present case.*

But we propose to show, further, that, aside from tax cases, the doctrine of *res adjudicata* will not hold where the issues in ordinary cases, other than tax cases, are not identical. This Honorable Court has, in 5 Wallace 592, laid down a definition and interpretation of the principle of *res adjudicata* in these words:

"It must appear by the record of the prior suit that the *particular controversy was necessarily tried and determined*, that is, if the record of the former trial shows *that the verdict could not have been rendered without deciding the particular matter*, it will be considered as having settled that matter as to all future actions between the parties. * * * *But even where it appears from the intrinsic evidence that the matter was properly within the issue controverted in the present suit, if it be not shown that the verdict and judgment necessarily involved its consideration and determination, it will not be concluded.*" (The italics are our own).

This definition has been approved by all commentators and jurists since its rendition, and has now become the universally accepted canon of construction of the doctrine of estoppel by the thing adjudged. It tersely states the doctrine of the old civilians, that the plea is "*non aliter genti obstat quam si eadem questio inter eadem personas revocetur;*

itaque et a demum nocet si omnia sint eadem, idem corpus, eodem quantitas, idem jus, eadem causa petendi, eadem que conditio personarum."

This Court has since consistently followed strictly the doctrine laid down in 5 Wallace. In addition to the authorities previously cited by us, 152 U. S. 315; 146 U. S. 174; 161 U. S. 174, deciding that *res adjudicata* will not apply to tax suits of different years, we now ask your Honors' attention to the following authorities, in cases where questions of taxes were not involved, and in which it is established that the plea of *res adjudicata* will not apply unless in cases of "*eadem questio*," as the civilians say, or as 5 Wallace lays it down:

Where "the particular controversy was necessarily tried and determined," * * * and it is shown "from the intrinsic evidence that the matter was properly within the issue controverted in the present suit," or where "it is shown that the verdict and judgment necessarily involved its consideration and determination."

In this examination of authorities we embrace those cited in your Honors' opinion.

Your Honors cite and quote from 94 U. S. 353. This case, in our opinion, strongly supports our contention as shown in the last clause of the quota-

tion which your Honors make in these words, which we italicize: "The inquiry must always be *as to the point or question litigated and determined in the original action, not what might have been thus litigated. Only upon such matters is the judgment conclusive in another action.*" And so again in 157 U. S. 687, quoted by your Honors: "The judgment in that case is therefore not conclusive in this as to matters which ~~were in fact decided.~~"

Applying this principle to the case on hand "the point or question litigated and determined in the original action is not the same."

The case, 19,441, Civil District Court, did not touch the questions of the validity or invalidity of Act No. 47 of 1874, or Act No. 97 of 1880, for they were not involved.

A close review of the authorities in 94 U. S. 354, et seq., fortify our opinion. So in 94 U. S. 608, the Court said:

"It is undoubtedly settled law that a judgment of a Court of competent jurisdiction upon a question directly involved in one suit, is conclusive as to that question in another suit between the same parties. But to this operation of the judgment it must appear, either upon the face of the record or be shown by extrinsic evidence that the precise question was raised and determined in the former

suit. If there be any uncertainty on this head in the record—as for example if it appear that several distinct matters may have been litigated, upon one or more of which the judgment may have passed, without indicating which of them was thus litigated and upon which the judgment was rendered—the whole subject matter of the action will be at large, and open to a new contention, unless this uncertainty be removed by extrinsic evidence *showing the precise point involved and determined.* To apply the judgment, and give effect to the adjudication actually made when the record leaves the matter in doubt, such evidence is admissible." The italics are our own.

So in 94 U. S. 428, the Court said: "It operates as an estoppel only upon the matter actually at issue and determined in the original action; and such matter, when not disclosed by the pleadings, must be shown by extrinsic evidence."

Now the pleadings or judgment in 19,441, do not show that the question of the validity or invalidity of the Act of 1874 or 1880 were ever in question, urged or considered.

In the petition (Rec. p. 200), the plea of *res adjudicata* was made, based on the Bouny decision. The judgment only states "for the reasons orally assigned by the Court, the law and evidence being

in favor of plaintiffs." It is to be presumed therefore, that the judgment was based on a wrongful application of the doctrine of *res adjudicata*, and not on the question of the Acts of 1874 and 1880. 99 U. S. 263, decides that where pleadings and judgment do not clearly show the point or points decided, *aliunde* parole evidence is admissible to show "on what precise issue the verdict or judgment was rendered." 101 U. S. 638 turns on a point of evidence only—a mere question of fact. 103 U. S. 69 was also a question of fact, decided in the former suit. In 104 U. S. 510, the Court said, referring to 94 U. S. 351, and approving it: "It was distinctly held that a determination in one action, that a plaintiff was not a holder for value of certain coupons sued on, does not estop him from proving in another action that he was such an owner of other coupons detached from the same bonds. The proposition in this case is but the converse of that." 144 U. S. 610 decides (for brevity we quote the syllabus on this point): "When a second suit is upon the same cause of action, and between the same parties as a former suit, the judgment in the former is conclusive in the latter as to every question which was or might have been presented and determined in the first action; but when the second suit is upon a different cause of action, though be-

tween the same parties, the judgment in the former action operates as an estoppel *only as to the point or question actually litigated and determined, and not as to other matters which might have been litigated and determined.*" The italics are our own. In 152 U. S. 252, it was decided that where, in a second suit for certain royalties for use of a patent, a prior decision between the same parties for a portion of royalties other than that sued for in the first suit, identically the same defence being made in the second as in the first suit, the former judgment was valid as *res adjudicata.* The lower Court had maintained the plea because "the same legal questions had been raised upon a claim for a prior installment of license fees." The Supreme Court affirmed the judgment of the lower Court, saying (p. 261) the test of the plea was "whether the question sought to be raised in the subsequent suit was covered by the pleadings and actually determined in the former suit," and decided that it was.

Applying the principles enunciated in these decisions to the case in hand, what do we find?

In all the suits and judgments pleaded as *res adjudicata* the question was as to the issue whether the exemption of the bank under the Acts of 1833 and 1836 was unconstitutional as being in contravention of articles of the Louisiana Constitutions of 1812,

1845, 1852 and 1864, and as to whether the Constitution of 1868 repealed the exemption existing at the time of its adoption. The judgments in the cases pleaded settled those questions finally, and on those points, *and on them alone*, the judgments can be pleaded as *res adjudicata*. But on the questions as to the extension under the Act of 1874, which was not raised or passed upon, they are not *res adjudicata*. Nor are they *res adjudicata* on the question of the renunciation of the bank in 1880, which also was not raised or passed upon in any of them.

That this is the rule of the Civil Law, by which the Code of Louisiana is to be construed, becomes plain when we examine the French Commentators as interpreted by Article 2286 of the Louisiana Civil Code, which is a literal translation of Article 1351 of the Code Napoleon. Marcadé, Explication de Code Napoleon, Tom. 5, p. 167, 5me edit., says:

"La règle est donc de ne considérer ici que la base immédiate. Mais bien entendu des la que cette base immédiate n'est pas la même dans les deux demandes, il n'y a plus chose jugée et la demande nouvelle est recevable.—Ainsi quand on a succombé dans une demande en annulation d'une convention pour vice de consentement (par erreur, dol, ou violence), on pourra fort bien en demander de

nouveau l'annulation pour incapacité (vu l'état d'interdiction de la personne ou le défault d'autorisation maritale si c'est une femme mariée). Car quoiqu'il y ait ici de l'analogie entre les causes des deux demandes, ce sont cependant deux causes distinctes, dont l'une (le consentement vicié) réglée par les Arts. 1109 et suivants, présente l'absence *de la premiére* des quatre conditions requises pour la validité de contrats dans l'article 1108, tandis que l'autre (le défaut d'aptitude legal a s'obliger) réglée par les Art. 1123-1125, est l'absence *de la seconde* de ces mêmes conditions. Ainsi encore, on a jugé avec raison que celui qui avait d'abord demandé a faire declarer sans effêt le testament d'un Français naturalisé a l'ètranger sans autorisation, en se fondant sur ce que d'après le décret de 1811, les biens de ce Français 'étaiént trouvés confisqués par le fait de sa naturalisation, pouvait très bien, après avoir succombé dans cette demande (parceque la confiscation ètablic par le de décret a été abolie par la charte de 1814) faire valoir contre ce même testament une nullité tirée de ce que le testateur étant privé de ses droits civiles par le même décret s'était ainsi trouvé incapable de tester. On voit, en effet, que l'objet de deux pretentions successives, *la nullité de testament n'était pas reclamé dans les deux cas pour la*

même cause: dans le premier *cas, cette cause la prétendue absence, chez le testateur, du titre de propriétaire des biens; dans le second, c'était son incapacité personelle. La diversitè de cause se rencontrait donc dès le premier degré, dans la base prochaine, et sans qu'il fut besoin de remonter plus haut.*"

We italicise the last clause to call attention to the fact that, although the object in both suits was to annul the will, and it was decided in the first suit that the will was not a nullity, on the ground advanced in that case, that is, that the property of a ~~naturalized~~ French citizen, in another country without a special authorization was confiscated; that judgment would not be *res adjudicata* in a second suit by the same party to annul the same will on the ground that the testator, being deprived of his civil rights, under the law, was legally incapable and incompetent of making a will. Marcadé cites the arrêt Pau, 19 Mars; Devil. et Car., 34, 11,441, and goes on and discusses the question at great length.

Applying this doctrine to the case in hand, we find that the prior cases and judgments pleaded involved the question of the validity of the bank's exemption, as the present cause also does. But the cases pleaded as *res adjudicata* involved only

the question as to the constitutionality of the exemption under the Louisiana Constitutions of 1812, 1845, 1852, 1864 and 1868, during the existence of the original charter.

The present suit attacks the exemption of the bank under Act 79 of 1880 and the Constitution of 1879, after the expiration of the charter.

So that, as Marcadé, who is considered the best of the French Commentators, points out two separate and distinct causes of action are presented in the two classes of cases, and therefore the plea of the thing adjudged cannot apply in the present cause.

So Laurent, Droit Civil Français, Tom. xx, pp. 81, 82, Sec. 64, illustrates the same principle, and says that a party may claim a piece of ground as being an owner by purchase, and judgment be rendered against him; such a judgment will not be *res adjudicata* in a second suit between the same parties in which the same plaintiff claims the same property as having been acquired by him by exchange; should the plaintiff fail in the second suit, the judgment would not be *res adjudicata* in a third suit in which the plaintiff should claim to be owner by donation or legacy and so on, and as he says: "Je puis en former une troisième ou une quatrieme, en me fondant chaque fois sur une cause nouvelle;

la diversitè de la cause fera qu'il n'y a pas chose jugée, quoique le droit reclamé soit toujours le même dans les diverses instances. Cette difference entre le droit et la cause sur loquelle il est fondé est elementaire."

In 40 An. 610, the syllabus reads: "A judgment in which a cause of action was not set forth, because it had then no existence, cannot constitute *res adjudicata*." And on p. 614: "The suit resting on such a cause of action, it is clear, that as this cause had not previously been averred, it could not be and was not passed upon by the judgment invoked to constitute *res adjudicata*."

But, we propose to show other cogent and valid reasons, why, from the intrinsic facts of the cases and judgments pleaded as *res adjudicata*, as shown on the face of the record, these judgments cannot be maintained as such.

The questions and issues involved in the cases at bar, are, by the various answers of the different officers, State and municipal.

1st. That Act No. 40 of 1874, extending the charter of the bank, did not, and could not, constitutionally, extend or prolong its exemption, as such extension or prolongation of the exemption is inconsistent with Art. 118 Constitution of Louisiana of 1868, and it therefore expired in 1884.

2d. That even had the exemption from taxation not expired in 1884, the bank by its acceptance of Act No. 79 of 1880 has subjected itself to the conditions prescribed in Articles 234 and 237 of the Constitution of 1879, and has thereby renounced its exemption.

In opposition and bar to these defences, appellees pleaded six separate and distinct judgments as *res adjudicata*. We propose to show *seriatim* that none of said judgments will support the plea, the first is, on p. 183 of the record.

Citizens' Bank of Louisiana, vs. P. L. Bouny, Tax Collector, Et Als. } 3rd District Court Orleans. 25,390.

This suit was filed June 25th, 1878, and enjoined the collection of taxes for the year 1878. The defence was that the exemption was unconstitutional under Articles 127 of the Constitution of 1845, 123 of 1852, 124 of 1864, and 118 of 1868, this last the then existing Constitution. The petition (Rec. p. 183) bases the exemption *entirely* on the original Acts of 1833 and 1836. The defence is that the exemption was not a contract, and was repealed by the articles of the three subsequent constitutions.

Judgment was rendered in the lower Court in favor of plaintiffs, January 14th, 1879, and signed January 18th, 1879.

From this judgment the defendants appealed, but the Supreme Court affirmed the decision of the lower Court (Rec. p. 191, et seq.)

It is obvious that this judgment cannot be held to be *res adjudicata*, because none of the questions or issues presented in the present case were decided or even alluded to. The only question decided was, as we have already said, that the Constitutions of 1812, 1845, 1852, 1864 and 1868, did not repeal the exemption of the bank, and that the charter was a contract. It cannot be held to be the thing adjudged.

1st. Because the present suit is brought after the expiration of the original charter, and does not involve the question of the invalidity of the exemption under the original charter. The Bouny suit was before the expiration in 1884.

2nd. The validity or invalidity of Act 47 of 1874, as to the extension of the exemption, was not involved in the Bouny suit. Indeed it was not even mentioned or alluded to, much less decided.

3rd. The Bouny suit did not touch the question of the renunciation by the bank of its exemption by Act No. 79 of 1880, as it is obvious it could not, as the Bouny suit was filed June 25th, 1878, for the taxes of the year 1878, and the renunciation act was only passed two years afterwards in 1880. The

question and issues here are entirely different from those in the Bouny case.

The Citizens' Bank
vs.
Board of Assessors. } 12,429. Div. B.

The record discloses no petition or answer, but only the judgment, and is therefore not complete as evidence of *res adjudicata* as no joinder of issue actual or constructive is shown. A personal inspection however, of the original petition and answers shows that the contention was confined to the same points as in the Bouny case, and concerned the taxes of 1884. The Bouny case is pleaded as *res adjudicata*. For the same reasons as above adduced against the Bouny case, this judgment cannot be sustained as *res adjudicata*.

The next case is found on p. 194 of the Record.

The City of New Orleans
vs.
The Citizens' Bank of La. } 3629. Civ. Dist. Court, Div. A.

This suit was filed July 26th, 1882, for city taxes of 1880, assessed in 1879. The issues presented were identical with those in the prior suits, except that there was no plea of *res adjudicata*. This judgment dismissed plaintiff's suit with costs. This judgment is not *res adjudicata* for the same reasons as adduced above in the two previous suits *and for the additional reason that it was a suit solely between*

the city and the bank. Neither the State or any of its officers being parties to it. IT IS THEREFORE SO FAR AS THEY ARE CONCERNED RES INTER ALOIS ACTA. 41 An. 998.

The next case pleaded as *res adjudicata*, on p. 197, Record is:

The Citizens' Bank of Louisiana vs. Charles Cavanac, Tax Collector. } 20,669. Div. C. Civil District Court.

This suit was filed April 1st, 1887, and concerned taxes of the years 1874, 1875 and 1876. The grounds stated in the petition are identically the same as in the previous cases, except that there was no plea of *res adjudicata*. An injunction issued. The Attorney General filed as answer for the tax collector, a general denial. For the reasons adduced already this case could not be *res adjudicata*, and FOR THE ADDITIONAL REASON THAT THE RECORD THERE DISCLOSES THAT NO JUDGMENT WAS RENDERED. NOR IS THIS A CLERICAL OMISSION, AS A PERSONAL INSPECTION OF THE ORIGINAL RECORD SHOWS THAT NO JUDGMENT WAS EVER RENDERED. Consequently, there being no judgment, there can be nothing adjudged.

We now come to the only two cases upon which the majority of your Honors seem to rely in main-

taining the plea of *res adjudicata*, as having been rendered for taxes of the years subsequent to the expiration of the original charter in 1884. On page 202 of the Record will be found :

The Citizens' Bank of Louisiana	}	20,541. Civ.
vs.		Dist. Court,
Board of Assessors Et Al.	}	Div. A.

The petition still claims exemption from the taxes of 1887, under the Acts of 1833, 1836, 1852, 1853, as under a contract, and in no way mentions the Act of 1874 or 1880. The City of New Orleans, according to the Record here (p. 204), made appearance and answer by way of general denial. NEITHER THE STATE OR ANY OF ITS OFFICERS MADE ANY APPEARANCE OR ANSWER. NOR WAS JUDGMENT BY DEFAULT TAKEN AGAINST THEM OR ANY OF THEM.

And yet the injunction was made perpetual against the Board of Assessors, the State officers, who had not appeared, and against whom no issue had been joined by default. Nor is the want of appearance, answer or default, so far as the assessors are concerned, a clerical omission in the record here. A personal inspection of the original record in the Civil District Court shows that the record here is correct and complete, and that neither appearance, answer or default were ever actually made. Plainly

the judgment was and is an absolute nullity, and as such cannot be pleaded as *res adjudicata*. It was a plain case of *coram non judice*.

The next and last pleaded as *res judicata* is on p. 199 of the record:

Citizens' Bank of La. vs. The Board of Assessors. } 19,144. Civil District Court. Div. D.

The petition was filed October 29th, 1896, and claimed exemption from taxes for the year 1886, on bank building and shares of stock. The grounds set forth were identically the same as in the previous cases, that is, reliance on the Acts of 1833, 1836, 1852, 1853, and claimed a contract and pleaded the Bouny judgment as *res adjudicata*. No mention is made of the Acts of 1874 or 1880 in either petition or answer. The relief prayed for is a judgment "decreeing said assessments of said shares and on said real estate to be null, and decreeing it to be cancelled and annulled, and that any inscription of the same in the mortgage office be erased and cancelled, and for general relief.

The answer of the tax collector set forth that "the said assessments were legally made" and should be maintained, and that no proper application for relief had been made to the Board of Assessors or committee of assessments had been made according to law.

The judgment was, "that the assessment for the year 1886 standing against the banking house or real estate in the square bounded by Gravier, Camp, Poydras and St. Charles streets, assessed at seventy-five thousand dollars on 10,500 shares of the capital stock at $42.75 per share, aggregating an assessment of $448.75, null and void and of no effect, and same be cancelled."

In the petition it was alleged "that the aforesaid assessment and shares of $448,875 purports to represent the capital of the bank, and especially in excess of the value of the shares of the capital, besides being illegal and without law; that the aforesaid real estate as aforesaid is in excess of the value of said real estate, besides being illegal."

If this judgment can be in anyway maintained at all as *res adjudicata*, it can only be so held in regard "to the banking house or real estate in the square," etc. That part of the judgment relating to the assessment "on 10,500 shares of the capital stock at $42.75 per share, aggregating an assessment of $448,875" cannot be so considered.

As your Honors say (op. p. 18) that the Supreme Court of Louisiana was correct in stating that the bank was "without authority to champion the rights of its stockholders." A right could only arise in the bank when the State attempted to make it pay what was due by the stockholders.

"A judgment to be effectual and binding, as an estoppel, must show that the subject matter has been passed on and adjudicated, and binds parties and privies, and it must be based on the jurisdiction of the person or of the subject matter. If either are wanting, the whole proceedings are *coram non judice*, and may be questioned in either a direct or collatteral proceeding; the decree in such a case being void, all acts under it are void, and all rights flowing from it are of the same character." 41 Ill. 45; Herman on Estoppel and *Res Adjudicata*, Vol. I, p. 551, Sec. 458.

It is unnecessary however, to multiply authorities on this point, as your Honors have already decreed (op. p. 21), rejecting "the claim of the bank to non-liability of its shareholders for taxation, without prejudice to the rights of the shareholders to resist an assessment for taxation against the shares owned by them *unaccompanied with an obligation on the part of the bank to pay, in case such tax should be levied by the laws of Louisiana.*"

The last clause, which we have italized, contains a decision on a question, which has never been litigated in the Courts of Louisiana, and has never been touched in any decision since the expiration of the charter in 1884, and there is not a line in any

of those recent decisions to warrant the considera- of that question as *res adjudicata*. Your Honors in the prior portion of the decree exempt the bank from the tax "on the capital stock, its banking house and furniture, and used for the purposes of its banking business, and on a tax on its shareholders *eo nomine* with a legal obligation on the bank to pay."

We consider that this discussion narrows itself down to this particular case, as the only valid judgment since 1884, and we think that we have abundantly shown that it is not *res adjudicata*.

We ask a rehearing on these three points in your Honors decision and decree.

1st. The exemption of the capital stock.

2nd. On the exoneration of the bank to pay the tax on the shares.

3d. The exemption of the banking house, furniture, etc.

I.

The Capital Stock.

While it is true that in the Bouny case, the capital stock was declared to be exempt, we have already shown that this decision cannot be regarded as *res adjudicata*. In 12,429, Civil District Court, Div. B. (Rec. p. 193), there was no tax on the capital stock in contest, and the judgment does not

cover capital stock, and we have already shown that the record is incomplete, showing no petition or answer, and it therefore cannot be pleaded as *res adjudicata*, for want of proper evidence.

In City of N. O. vs. Citizens' Bank of La., No. 3629 (Rec. p. 194), Civil District Court, there was no tax on capital stock involved, and the State was no party to the suit.

In Citizens' Bank vs. Cavanac, 20,698 (Rec. p. 197), there was only a contest on the tax on real estate, and none on the capital, and there was no judgment at all.

In Citizens' Bank of La. vs. Board of Assessors et als., 19,144, Civil District Court, Div. D, there, also, was no contest as to tax on capital stock, nor does the judgment touch it, as we have already shown.

In Citizens' Bank vs. City of New Orleans et als., 20,541, Div. A, Civil District Court, there was no contest or issue as to tax on capital stock. The judgment however does exonerate the capital stock. But we have already shown that the State or its officers made no appearance in that case, and no default was taken, and therefore the judgment as to them was, and is an absolute nullity. Besides this *there has not been, and there could not be any assessment of the capital stock of any bank in Lou-*

isiana since 1877. Act No. 8 of 1878, Sec. 1, para. 6, provided an assessment on "all capital invested or employed each year in trade, traffic or merchandise, or any kind of commerce, or other business, and all investments or values of any kind, *except the capital stock of banks* and banking associations whose shares are assessed in the hands of the shareholders)," and para. 8th provides for the assessment of the shares of stockholders on all "banks and banking associations in this State.

Section 48 of Act No. 77 of 1888 provides "that no assessment shall hereafter made under that name as heretofore of the capital stock of any national bank, banking company, banking firm or association, or of any corporation, company, firm or whose capital stock association is represented by shores, but the actual shares shall be assessed to the shareholders," etc.

This provision is re-enacted in Section 28, Act 96 of 1882.

In 1884 there was no new revenue law, but only an amendatory statute, No. 107, not affecting the bank provision in the former act.

Section 28 of Act 98 of 1886, re-enacts the Section 28 of Act of 1882, *in totidem verbis.*

Section 27 of Act No. 85 of 1888 does the same.

The Amendatory Act No. 106 of 1890, Section

27, the presently existing law, does the same, striking out the words "or of any corporation, company firm or association," but leaving the law of 1888 in force against the taxation of the capital stock of any bank. It is thus made plain that none of the judgments relied upon by our opponents as *res adjudicata* involved the question of assessments and taxation on the capital stock of the bank. Indeed, if they did, the question would have been a moot one, and a decision thereon would have no binding effect.

IN FACT THE EFFORT OF OUR OPPONENTS TO INTERJECT INTO THIS PRESENT SUIT THE QUESTION OR ISSUE OF THE NON-TAXABILITY OF THE BANK'S CAPITAL STOCK IS AN ATTEMPT TO INTERJECT A MOOT QUESTION, AS NO ATTEMPT HAS BEEN MADE SINCE 1887 TO TAX THE CAPITAL STOCK OF ANY BANK, AS IT IS PROHIBITED BY LAW, AS WE HAVE SHOWN. In their bill (Rec. p. 5) they only allege that the bank has been called upon for returns "of their property and the shares of their capital stock and the list of their shareholders;" and they do not allege that any attempt has been or will be made to asses or collect a tax on the bank's capital stock, and they ask for an injunction 'enjoining and restraining defendants'" * * * (Rec. p. 7); "to the end, therefore, that said Board

of Assessors for the Parish of Orleans may be enjoined and prohibited from making any assessment of the capital or property or shares of the capital or property or shares of the capital stock of your orator," and that the state tax collector be similarly enjoined and restrained from collecting the tax. The tax rolls themselves, copies of which are in the record, show that the capital of the bank is not taxed, nor is it sought to be taxed. The question, therefore, in so far as the taxability of capital stock of the bank is concerned is purely a moot question, of which your Honors cannot properly take cognizance. The relief sought by the appellees by the present injunction on this point is against a purely maginary injury, which does not exist, and cannot exist under the precise terms of our statutes. In 18 Wallace, 134, this Honorable Court said: "The record affords to us on its face the strongest reason to believe that it has been prepared from the beginning for the purpose of obtaining the opinion of this Court on important constitutional questions without the actual existence of the facts on which such questions can alone arise, it * * * "satisfies us that a moot case was deliberately made up to raise the particular point when the real facts of the case would not have done so, and we do not feel at liberty under all the circumstances to pass on it on

this record." It is also an elemental principle of the law of injunctions, that an injunction will not be granted, nor perpetuated when granted, unless it be shown that there is an actual injury being committed, or there is just and reasonable ground to believe or apprehend that it will be committed.

II.

The Exemption of the Bank from Paying the Tax on the Shares for the Shareholders.

This question is no where raised in any of the cases or judgments pleaded as *res adjudicata*. The bank has no where raised the point, or urged this defence. Whenever the bank's pleadings have touched the question of the tax on shares, held by stockholders, it has been only to contend that they, the shareholders, were not liable to taxation.

The judgments have gone no further than this. We have already shown that the bank could not raise that question, in a suit, to which the stockholders themselves were not parties, and that the judgments thereon were invalid, and absolutely null, *coram non judice*, and that your Honors so treat them in your opinion and decree.

III.

The Exemption of the Banking House, Furniture, Etc.

In the Bouny suit these items of taxation are not contested, as according to the petition real estate is excluded from the assessment. The judgment of the lower Court, which was affirmed by the Supreme Court of Louisiana simply declares the assessments "null and void." In 12,429, Div. B (incomplete Record), real estate and furniture were absolved from taxation. In City of N. O. vs. Citizens' Bank, 3629, Civil District Court, real estate and furniture were included, but the State was not a party to the suit, nor its officers. In the suit against Cavanac, tax collector, real estate alone was involved, but there was no judgment. In 19,144, Citizens' Bank of La. vs. Board of Assessors, real estate and furniture were included. In 20,541, Citizens' Bank of La. vs. Board of Assessors, banking building and furniture were included, but neither the State nor its officers appeared, nor was any default taken against them.

In all these cases and judgments several prominent facts appear which are remarkable:

1st. In none of them, with the exception of the Bouny case and the Cavanac case (the latter of which

did not ripen into judgment), did any law officer of the State appear on behalf of the officers of the State, nor do they seem to have been aware of the litigation. In No. 19,144, the only case in which an answer was filed by the tax collector, *and the only case in which issue has been joined by the State*, since the expiration of the charter of the bank in 1884, the answer was filed by the private counsel of the tax collector.

2d. In none of the cases and judgments, and especially in 19,144, on which your Honors seem to mainly base the maintenance of the plea of *res adjudicata* are the two great vital and seminal questions involved or decided upon, that is the effect of the Act 40 of 1874, and the Act No. 97 of 1880. We therefore contend that, aside from the reasons and arguments hereinbefore adduced by us, as to the non-application of the doctrine of estoppel by *res adjudicata* in tax cases, that even in an ordinary case, not involving the question of taxation, these judgments would not constitute *res adjudicata.*

But your Honors seem to argue, in your opinion, that even if the plea of *res adjudicata*, be not maintained as such, that the Courts of Louisiana have uniformally *incidentally by dicta*, in an extended course of decisions, inclined to support the exemp-

tion of the bank, and seem to think that great weight should be attached to that fact. On p. 9 of the opinion, your Honors quote from the decision of the Supreme Court of the State of Louisiana in 48 An. 35, as follows:

"We refrained from stating the effects as to the taxation of the bank's capital in consequence of Act 79 of 1880. We now do the same, because we deem it unnecessary to do so. We propose to let that question as to the exemption of the bank's capital rest on the decisions heretofore rendered. * * *

We think the Citizens' Bank has heretofore all that it is entitled to, the exemption from taxation of its capital proper, and the real estate necessary for carrying on its legitimate business."

Your Honors then say: "From the foregoing statement it is evident that the contention of the plaintiffs in error, if maintained, will overthrow the construction of a statute of the State of Louisiana sanctioned by nearly sixty years of practical execution and supported by decrees of the Courts of that State, which are final and which were regularly rendered during a long period of time whenever an attempt was made to assess the property of the bank."

In so far as the quotation from 48 An. is concerned, a perusal of that decision shows that the

language is a plain *obiter dictum*, as the question of the taxability of the bank's *capital* was not at issue, as the decision shows that it decided, that lands purchased under foreclosure by the bank were not a part of the capital. That question was the only one involved, and is one in which your Honors are of the same mind as the Louisiana Supreme Court. The question of the taxability of the capital or property of the bank, outside that of lands purchased under foreclosure, was one not "necessarily tried and determined," and "the judgment" did not "necessarily involve its consideration and determination," and therefore, it is not conclusive.

Besides this, the Louisiana Court especially states that it " refrained from stating the effects as to the taxation of the bank's capital in consequence of the Act 79 of 1880. We now do the same, because we deem it unnecessary to do so." In adding: "We propose to let that question as to the exemption of the bank's capital rest on the decisions heretofore rendered." This was nothing more than an *abiter dictum.* The decisions heretofore rendered had never touched, even remotely, the changed condition of the bank's charter under Act 79 of 1880.

Further on, in your Honors' opinion, you state

that "during the greater portion of the time when the charter was construed by the officers of the State of Louisiana, and interpreted by the Courts as rendering the taxation of the bank illegal, the original charter was in force, and the question whether the bank was *subject to taxation during the term of its extended charter could not, therefore, technically arise.*"

Rejecting, therefore, all judgments prior to 1884, for the reason in the clause italicized by us, what is there left of the judgments pleaded as *res adjudicata?* The single judgment in Div. D, 19,441, in which we have already shown no law officer of the State appeared, and which we have already demonstrated, does not possess the necessary elements of the thing adjudged. But, in addition to the plea of *res adjudicata*, the ground is advanced of *acquiescence* ON THE PART OF THE STATE OFFICERS IN THE EXEMPTION OF THE BANK as binding on the State.

Your Honors seem to lay considerable stress, in the opinion, on what you argue is this acquiescence by the State in the judgments of the Civil District Court of Orleans. On p. 4 of the opinion your Honors say: "From the date of the original charter in 1833 to the year 1877, that is for a period of forty-four years, no attempt was made by the State

or any of its political subdivisions to tax the bank on the subjects of taxation referred to in the first heading. The State, therefore, in all its taxing departments of every nature for this long period recognized the bank as in part not subject to taxation," and, again, on p. 7: "From 1879 to 1884, presumably in consequence of the foregoing judicial proceedings, no assessment was made against the bank," and on same page, from the date of the assessment in 1884 no other assessment on the subjects of taxation referred to was made against the bank," and, again, on p. 8, "from the date of this judgment in 1887 to the year 1892 to quote the language of the deputy recorder of mortgages, there are no assessments on the roll against the bank on capital or on the bank building, or on the shares. In the place of the assessments there is the word exempt and the name of the bank, but no assessments of which I have spoken (referring to those above alluded to) have been marked canceled by order of Court." Again your Honors say, on p. 9, "From the foregoing statement it is evident that the contention of the plaintiffs in error, if maintained, will overthrow the construction of a statute of the State of Louisiana sanctioned by nearly sixty years of practical execution and supported by decrees of the Courts

of that State, which are final, and which were regularly rendered during a long period of time whenever an attempt was made to assess the property of the bank." The opinion, however, frankly states that this argument of "acquiescence" would not justly apply save to the period from the expiration of the old charter in 1884, up to the date of the institution of the present suit in August, 1892, a period of eight years only, and the record shows that the property of the bank was assessed for the year 1884, and again in 1886, and 1887, thus demonstrating that up to 1887 there was no acquiescence on the part of the State in the exemption of the bank, but on the contrary the officers of the State were constantly asserting its liability to taxation. But even if this state of facts were not so, we respectfully suggest that no such alleged acquiescence can be urged against the State, on account of the mistakes, omissions, laches, negligence or collusion of its officers charged with the assessment and collection of its taxes.

To admit the validity and binding force of such action of its officers on the sovereign, would be to subvert the first principles of public law, which regulate and control the relations between the government and its citizens. It would be in effect

to impute laches to the sovereign, and thereby absolve and relieve the subject from his obligation to contribute to the public *fisc* for the protection which he and his property receive from the government. That this cannot be done is plain under the elemental principles of *nullum tempus occurrit regi*, which although oftenest applied to questions of prescription and limitations, is universal in its application to all the governmental relations of sovereign and subject.

Broom's Legal Maxims (8th edition), page 65, under the maxim *Nullum tempus occurrit regi* says:

"In pursuance of the principle already considered, of the sovereign's incapability of doing wrong, the law also determines that in the crown there can be no negligence or laches; and therefore it was formerly held, that no delay in resorting to his remedy would bar the king's right, for the time and attention of the sovereign must be supposed to be occupied by the cares of government, nor is there any reason that he should suffer by the negligence of his officers, or by their fraudulent collusion with the adverse party; and although, as we shall hereafter see, the maxim *vigilantibus et non dormientibus jura subveniunt* is a rule for the subject, yet *nullum tempus occurrit regi* is, in general, the king's plea. From this doctrine it followed, not only that

the civil claims of the crown sustained no prejudice by lapse of time, but that criminal prosecutions for felonies or misdemeanors might be commenced at any distance of time from the commission of the offence." It then goes on to show that the former doctrine has been somewhat modified by acts of parliament establishing by statutes certain prescriptions against the crown. In the note is cited, Bac. Abr. 7th edition, "Prerogative" (E. 6).

Bacon's Abridgement, 8 Vol. (Bouvier's Am. edition) 95, lays down the rule that "from the presumption that the king is daily employed in the weighty and public affairs of government, it hath become an established rule at common law, that no laches shall be imputed to him, nor is he in any way to suffer in his interests, which are certain and permanent; and this, his privilege, *quod nullum tempus occurrit regi* has been confirmed by the statute *de prærogative regis*." Bouvier, the American editor, adds in note (a), "*vigilantibus et non dormiontibus jura subveniunt* is a rule for the subject, but *nullum tempus occurrit regi* is the king's plea; for there is no reason that he should suffer by the negligence of his officers. Hob. 347. Laches are not imputable to the government. 12 Wheat. 505; 3 Mason, 446; 9 Wheat. 720; 1 Peters, 325; 1 Mass. T. R. 347."

Bacon gives, on pages 95 et seq., many applications of the principle that where the statute requires that certain claims must be preferred or certain acts done, within certain delays, such statutes will not apply to the sovereign, and that the king will not be barred of his right by non-action of his officers within the delays prescribed. This doctrine is held by the modern commentators and modern jurisprudence, especially as regards the exercise of governmental functions, such as taxation.

"It is a generat rule that laches on the part of its officers is not imputable to the government in its character of sovereign by those subject to its dominition." Eng. & Am. Ency. of Law, Vol. 12, p. 582, and authorities in Note 2.

Meacham on Public Officers, §308, quotes, with approval, from Judge Story, in 9 Wheaton, 720: "The general principle is, that laches is not imputable to the government; and this maxim is founded. not on the notion of extraordinary prerogative, but upon a great public policy. The government can transact its business only through its agents; and the fiscal operations are so various and its agencies so numerous and scattered, that the utmost vigilance would not save the public from the most serious losses. if the doctrine of laches can be applied to its transactions. It would, in effect, repeal all securities."

The doctrine thus laid down is as equally applicable to "acquiescence" as to mere "lâches." Indeed, "acquiescence," meaning more than "lâches," implies not only neglect, but a tacit assent, it follows *a forhori* that the doctrine of *nullum tempus occurrit regi* would apply with greater force to cases of alleged "acquiescence" than to "lâches" on the part of the officers. For this difference between the former and the latter, we refer to the Eng. & Am. Encyc. of Law, Vol. 12, p. 536 et seq., where the authorities on the subject, both English and American, are carefully collated and digested. To maintain that the sovereign can be barred or bound by the "acquiescence" of its officers in matters of taxation, would be to give the power to subordinate officers by neglect or collusion to waive or abandon the State's claim for its taxes. It would be giving to these subordinate executive officers a power which the Louisiana Constitution of 1879, Art. 57, withholds from the General Assembly of the State. That article reads: "The General Assembly shall have no power to release or extinguish, or to authorize the releasing or extinguishing, or to authorize the releasing or extinguishing in whole or in part, the indebtedness, liability or obligation of any corporation or individual to this State, or to any parish or municipal corporation." To permit the

doctrine of "acquiescence" would be to allow subordinate executive officers to do by indirection what the Legislature itself is prohibited from doing directly by statute. To construe the forbearance, neglect or carelessness of the subordinate officers of the tax department of the State in not pursuing the proper remedies for the collection of the taxes due the State into an abandonment on the part of the State of the right of taxation and acquiescence in the exemption of a subject from taxation, would be the establishment of a precedent, which would paralyze and palsy the arm of government in the collection of its revenues, and establish a tacit exemption, which cannot be done under any system of law. This Honorable Court, in 152 U. S. 305, citing 10 How. 376, said (306): "A general rule was laid down in this case to which this Court has steadily adhered, that the taxing power of the State should never be presumed to be relinquished, unless the intention to do so be declared in clear and unambiguous terms. This case was reaffirmed in the Delaware Railroad Tax, 18 Wall. 206." In the latter case, cited, the Court said: Speaking of exemptions from taxation, "nothing can be taken against the State by inference."

In conclusion to summarize the grounds on which we respectfully ask a rehearing.

1st. The Federal Courts should follow the rule of law laid down by the Supreme Courts of the States in tax cases, and Louisiana, Iowa, Texas and Tennessee, have decided that a judgment in a case for taxes for one year is not *res adjudicata* for those of another year, even in cases of exemption.

2nd. The Federal Courts have uniformly maintained that principle.

3rd. The authorities adduced in your Honors' opinion in cases other than those of tax, do not directly apply to tax cases, and in so far as they remotely affect the question decide that the plea of *res adjudicata* should not be maintained in this cause.

4th. The cases and judgments pleaded as *res adjudicata* here, do not touch the facts or law involved in the present cause.

5th. The question of taxability of the bank's capital stock is a moot question, which this Court will not decide.

6th. There can be no acquiescence presumed or inferred in exemption from taxation by the State, from the *lâches*, carelessness, negligence, silence, inaction or collusion of its officers.

Having in view the fact of the great importance of the issues herein involved, not only to the fisc of the State of Louisiana, but as affecting the princi-

ples of taxation of all the States of the Union, we respectfully solicit a rehearing, in order that we may be allowed to argue, orally, these important questions, to which but little attention was paid in our former briefs and oral argument, for the reason that we did not then regard the question of *res adjudicata* under the circumstances of this cause as of such importance as to merit much serious consideration at our hands. Indeed, the other points in the case obscured, in our then opinion, this plea in estoppel.

All of which is respectfully submitted.

M. J. CUNNINGHAM,
Att'y Gen. State of La.

F. C. ZACHARIE,
Attorney for State Tax Collectors and Assessors.

ALEX. PORTER MORSE,
Associate Counsel.

CERTIFICATE.

We, M. J. Cunningham, Attorney General of the State of Louisiana, F. C. Zacharie, Attorney for State Tax Collectors and Board of Assessors, and Alex. Porter Morse, associate counsel, all of counsel for appellants in the cause of the Board of Assessors, Tax Collectors and City of New Orleans vs. the Citizens' Bank, appealed from the Circuit for the Eastern District of Louisiana, No. 108, October Term, 1896, do hereby certify that we have examined the foregoing petition for a rehearing in said cause, and we are of opinion that the reasons and grounds presented in support of the application therein set forth, for a rehearing of said cause, are well founded in law, and that there is good and just reason for the filing of said petition, and that the same is not presented for delay, and we further certify that we have on this the twenty-fourth day of September, 1897, served copies of said petition and brief on opposing counsel.

M. J. Cunningham

Attorney General, State of La.

F. C. Zacharie

Attorney for Tax Collectors and Board of Assessors.

Alexander Porter Morse

Associate Counsel.

Of Counsel for Appellants.

167-371

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1896.

THE CITY OF NEW ORLEANS, THE BOARD OF ASSESSORS OF ORLEANS ET AL.,
APPELLANTS,
v.
THE CITIZENS' BANK OF LOUISIANA.

No. 108.

Appeal from the Circuit Court of the United States for the Eastern District of Louisiana.

M. J. CUNNINGHAM,
Attorney General State of Louisiana.
F. C. ZACHARIE,
Attorney for State Tax Collectors and Assessors.

ALEXANDER PORTER MORSE,
Associate Counsel.

WASHINGTON, D. C.:
GIBSON BROS., PRINTERS AND BOOKBINDERS.
1897.

Supreme Court of the United States.

OCTOBER TERM, 1896.

THE CITY OF NEW ORLEANS, THE BOARD OF ASSESSORS OF ORLEANS ET AL.,
APPELLANTS,
v.
THE CITIZENS' BANK OF LOUISIANA.
No. 108.

Appeal from the Circuit Court of the United States for the Eastern District of Louisiana.

In view of the filing on or about the 12th day of October, 1897, in the clerk's office by appellee of a certain brief by counsel for appellee, accompanied by an affidavit subscribed by the president of the appellee corporation, containing sundry averments which the appellants have not had an opportunity to answer, protesting against the granting of appellants' application for rehearing, come now counsel for appellants and pray the court that the consideration and disposition of the application for rehearing submitted by appellants may be deferred until counsel shall have had opportunity, say ten days from date of this motion, to answer by brief and counter affi-

davits the brief and allegations contained in paper filed on behalf of the appellee:

And for grounds of this application say that it was only since the submission of appellants' application for rehearing that counsel for appellants in the city of New Orleans was placed in possession of a copy and notified of the filing of appellee's protesting brief and affidavit; that, in the opinion of counsel for appellants, the aforesaid affidavit reflects upon the course of the law officers of the State of Louisiana, and contains matter which should be answered; that the attorney-general of the State of Louisiana has for some time been beyond the reach of communication, having been quarantined at some point outside the city of New Orleans while temporarily absent from his public office, and that, owing to the prevailing epidemic in the southern portion of Louisiana, communication is still attended with unusual delay and embarrassment.

As this motion was being printed a telegram in the words following is received from the Attorney-General of Louisiana:

"Just learned of President Notts affidavit. quarantine almost closes communications. Will mail counter-affidavit today property taxes were accepted with understanding not affect rehearing.

To correct in some part misapprehension of the meaning of that portion of the affidavit of the president of the appellee to which counsel for appellants take exception, a communication from counsel of appellee is hereto annexed.

All of which is respectfully submitted.

F. C. ZACHARIE,
Attorney for State Tax Collectors and Assessors.
ALEXANDER PORTER MORSE,
Associate Counsel.

WASHINGTON, D. C., *Oct.* 15, 1897.

WASHINGTON, D. C., *October* 14, 1897.

ALEX. PORTER MORSE, Esq.,
Counsellor at Law.

MY DEAR SIR: The reference in Mr. Nott's affidavit with regard to the settlement between the Citizen's Bank of Louisiana and the State of Louisiana to the opinion of counsel that the settlement with the State was a bar to an application for a rehearing, was not intended by him to apply to the counsel for the State, but to the counsel for the Bank. This I know to be the fact.

Very truly yours,

WM. A. MAURY,
Of Counsel, &c., &c.

167-371

Supreme Court of the United States.

OCTOBER TERM, 1896.

No. 108.

THE CITY OF NEW ORLEANS, THE BOARD OF ASSESSORS FOR THE PARISH OF ORLEANS, AND OTHERS, APPELLANTS,

vs.

THE CITIZENS' BANK OF LOUISIANA.

WM. A. MAURY,
HENRY DENIS,
BRANCH K. MILLER,
For The Citizens' Bank.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C. 10-6-96

IN THE

Supreme Court of the United States

OCTOBER TERM, 1896.

No. 108.

THE CITY OF NEW ORLEANS, THE BOARD OF ASSESSORS FOR THE PARISH OF ORLEANS, AND OTHERS, APPELLANTS,

vs.

THE CITIZENS' BANK OF LOUISIANA.

We have been served with a copy of the petition and brief filed by the State of Louisiana in the said cause and asking that the same may be reheard for the reasons therein stated.

The only comment we have to make on this application is to call attention to the pregnant fact that the city of New Orleans is not a party to it.

But, in view of certain matters *in pais* which have occurred since the close of the last term of the court and which are set forth in the following affidavit, we submit that this application for a rehearing is entirely inadmissible:—

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1896.

THE CITY OF NEW ORLEANS, THE BOARD OF ASSESSORS FOR THE PARISH OF ORLEANS, and Others, *Appellants*,
vs.
THE CITIZENS' BANK OF LOUISIANA.
No. 108.

THE STATE OF LOUISIANA *ex Rel.* CITIZENS' BANK OF LOUISIANA
vs.
THE BOARD OF ASSESSORS FOR THE PARISH OF ORLEANS, THE CITY OF NEW ORLEANS, *et al.*
No. 483.

In error to the supreme court of Louisiana.

Personally appeared before the undersigned, a notary public in and for the District of Columbia, George W. Nott, of the city of New Orleans, Louisiana, and made oath that he is president of The Citizens' Bank of Louisiana, the appellee in the above-entitled cause; that since the last adjournment of the said Supreme Court, to wit, on the twentieth day of August, 1897, at the city of New Orleans, the said Citizens' Bank of Louisiana and the Honorable M. J. Cunningham, the attorney general of the State of Louisiana, with the concurrence of the auditor of the said State, came to an agreement of compromise with regard to the taxes claimed by the State of Louisiana from the said Citizens' bank on the stock-mortgage lands owned by the said bank; which said taxes were a part of the subject-matter in controversy in the said suit and the whole of the subject-matter involved in said suit No. 483, whereby the said Citizens' Bank, in consideration of the release by the State of Louisiana of the penalties and forfeitures, amounting to the sum of eighteen thousand dollars ($18,000), claimed on the part of the State to be due by the said bank by reason of its failure to pay the said taxes punctually, did pay the said State the sum of thirty thousand three hundred and sixty-five dollars ($30,365) in full satisfaction of all taxes assessed on said lands, except those assessed on stock-mortgage lands

situate in the parish of East Carroll, which were withheld for future settlement and adjustment, and the further sum of five thousand one hundred and fifty-four and $\frac{80}{100}$ dollars ($5,154.80) in full satisfaction of all attorneys' fees, costs, and expenses, being the attorneys' fees, costs, and expenses paid or incurred by the State of Louisiana in the said suit and in the suit of The State of Louisiana *ex rel.* Citizens' Bank of Louisiana *vs.* The Board of Assessors for the Parish of Orleans, The City of New Orleans, *et als.*, being No. 483 on the docket of the said Court for October term, 1896, which said causes were argued together as one cause; and this deponent further saith that said payments were made in the full belief, based on the opinion of counsel who took part in said settlement, that the same put an end to all further controversy between the said bank and the State of Louisiana as to all taxes involved in the said litigation; and further this deponent saith not.

G. W. NOTT,
President of the Citizens' Bank of Louisiana.

Given under my hand and seal this fifth day of October, 1897.

[SEAL.]

S. R. BOWEN,
Notary Public, D. C.

It thus appears that after the close of the last term of the Court the State of Louisiana and the Citizens' Bank of Louisiana entered into an agreement of compromise with reference to the taxes assessed on the stock-mortgage lands and involved in both suits, under which the bank paid the State the sum of $30,365 to cover all said taxes and $5,154.80 to cover counsel fees and other costs paid or incurred by the State, the State on her part remitting penalties and forfeitures on the delinquent taxes, amounting, in the aggregate, to the sum of $18,000.

The bank having thus voluntarily paid the taxes assessed on the stock-mortgage lands involved in case No. 108, is

foreclosed as to a rehearing in that particular by the principle *volenti non fit injuria*, and the State of Louisiana having by the inducement of the said agreement and the receipt of the said payment thereunder deprived the Citizens' Bank of the right to have the decrees of this Court in the said cases reviewed as to the validity of the assessments on the said stock-mortgage lands, is estopped to ask for a rehearing as to the residue of the decree in No. 108. Having accepted satisfaction of the decrees in both cases *quoad* the taxes on the stock-mortgage lands, the mutuality of right to apply for a rehearing in that particular has been destroyed. The decree in No. 108 is a unit, and the acceptance by the State of satisfaction of that part of it which makes for the State's good is as effective to release the supposed error in the residue as though there had been a formal release of all errors in the decree by the State. As the supreme court of Ohio say in Tabler *vs.* Wiseman (2 Ohio State, pp. 207, 216): "A party ought not to be permitted voluntarily to take the benefit of a judgment and then attempt to reverse it."

To the same effect is the language of the supreme court of Louisiana in Stinson *vs.* O'Neal (32 La. Ann., 947, 949):

"The court cannot tolerate their pretensions to reap the benefits of the judgment in its favorable features, and to ask in the same breath the reversal of the same judgment in other respects, when unfavorable to them. The right to appeal is as much affected by a partial execution of the judgment as it would be by a full and complete execution of the decree in all its parts." (See, also, Campbell *vs.* Orillion, 3 La. Ann., 115; Board of Church Wardens *vs.* Perche, 40 La. Ann., 201; Sterne *vs.* Vert, 108 Ind., 232; Clarke *vs.* Wright, 67 Ind., 224; Balt. & O. R. R. Co. *vs.* Johnson, 84 Ind., 420.)

It is respectfully submitted that the application should not be entertained.

WM. A. MAURY,
HENRY DENIS,
BRANCH K. MILLER,
For The Citizens' Bank.